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THE HONORABLE EDWARD F. SHEA

7 UNITED STATES DISTRICT COURT
8 FOR THE EASTERN DISTRICT OF WASHINGTON
9 SPOKANE DIVISION

10 KYLE STIFFARM,

11 Plaintiff,
12 vs.

13 CITY OF PULLMAN POLICE
14 DEPARTMENT and ANDREW WILSON

15 Defendants.

No.: CV-04-0414-EFS

PLAINTIFF STIFFARM'S
MOTION TO COMPEL DISCOVERY
WITH SUPPORTING ARGUMENT
AND AUTHORITY

HEARING DATE: April 17, 2006

16 1. Identity of Moving Party.

17 Kyle Stiffarm, Plaintiff.

18 2. Statement of Relief Sought.

19 The Plaintiff requests that the Defendant be required to fully and completely respond to
20 properly propounded interrogatories and requests for documents pursuant to FRCP 26 and 37.
21 Specifically, Plaintiff requests that the City of Pullman supply fully responsive answers to
22 Interrogatories 4, 5, 6, & 7 contained in the Plaintiff's Second Interrogatories and Requests for
23 Production and produce the documents requested in response to Request for Production No. 3 in
24 the same.
25

1 3. Facts Relevant to Motion.

2 Plaintiff, Kyle Stiffarm, brings a 42 U.S.C. 1983 action against the City of Pullman and
3 police officer Andrew Wilson. Stiffarm asserts that the actions of Wilson and the City deprived
4 him of his constitutional rights as protected by the Fourth, Sixth and Fourteenth Amendments of
5 the United States Constitution. Stiffarm also brings ancillary state law claims alleging false
6 arrest, false imprisonment, assault, and malicious prosecution.

7 The Plaintiff's Second Interrogatories and Requests for Production were mailed
8 November 29, 2005 to the Defendant City of Pullman. The City provided Answers dated
9 February 2, 2006.¹ The Defendant City of Pullman has refused to provide discovery propounded
10 to it in response to request for production number 3 which states: "Produce all job performance
11 reviews and evaluations for Andrew Wilson." (Declaration of Martonick, Exhibit A.) The City,
12 in claiming that the performance reviews and evaluations of Andrew Wilson are exempt under
13 the Washington State Public Records Act, made the following response:

15 Objection. Performance evaluations and reviews of Andrew Wilson are
16 exempt from disclosure under RCW 42.17.310(1)(b) and RCW 42.17.255. Also,
17 see, *Dawson v. Daley*, 120 Wn.2d 782 (1993), and *Brown v. Seattle Public*
Schools, 71 Wn. App. 613 (1993).

18 (Declaration of Martonick, Exhibit A.) In addition, the City has provided non-responsive
19 answers to the following written interrogatories:

20 Interrogatory #5: State whether the Pullman Police Department has in place
21 policies or procedures for reviewing or evaluating arrests by its' police officers
22 for the existence or lack of probable cause to make the arrests and if so what those
23 policy and procedure are.
24
25

¹ Although the City's Answers were made more than 30 days after the requests, the Plaintiff's attorney had granted an extension of time for the City to make its replies.

1 Answer: Objection, this interrogatory is vague and ambiguous. Without
2 waiving said objections, all Pullman officers are required to establish probable
3 cause before making arrest. [citation to Policy manual omitted.] In addition,
4 citations are reviewed by the Whitman County Prosecuting Attorney for this
5 issue.

6 Interrogatory #6: State whether the Pullman Police Department has in place
7 policies or procedures for reviewing or evaluating arrests by its' police officers
8 for excessive use of force in the conduct of arrests and if so what those policy and
9 procedure are.

10 Answer: Objection, vague and ambiguous. Without waiving these objections,
11 the Pullman Police Department Policy Manual has an entire chapter – Chapter 10
12 – describing the appropriate use of force by officers. [citation omitted.] It is the
13 Department's policy that "members shall use only the minimum amount of force
14 necessary to effect the lawful purpose intended." [citation omitted.] In addition
15 to this, members of the pubic who believed that they have been subjected to
16 excessive force may file a complaint with the police department. [citation
17 omitted.]

18 Interrogatory #7: State whether the Pullman Police Department has in place
19 policies or procedures for reviewing or evaluating arrests by its' police officers
20 for ethnic or racial animus or bias in the conduct of arrests and if so what those
21 policy and procedure are.

22 Answer: Objection, vague and ambiguous. Without waiving these objections,
23 racial discrimination is specifically prohibited by the Pullman Police Department.
24 "Members of the Department shall not discriminate against any person because of
25 the person's nationality, race, color creed, sex, sexual preference or religious
beliefs." [citation omitted.] In addition to this, members of the public who
believe they have been subjected to racial animus or bias may file a complaint
with the police department. [citation omitted.]

Interrogatory #4: State whether the Pullman Police Department has in place
policies or procedures for reviewing or evaluating citations issued by its' police
officers for sufficiency of the charging language and accuracy of statutory
citations and if so what those policies or procedures are.

Answer: Objection, vague and ambiguous. Without waiving said objections,
Pullman Police Department Policies and Procedures Manual (Policy Manual),
Chapter 13 is a 40-page section governing Reports, Records and Department
Information. [citation omitted.] Specifically all officers "are required to
accurately complete all required reports and forms." [citation omitted.] In
addition, members are required to "complete all reports in a truthful, accurate,
legible manner and submit them through proper channels immediately upon
completion." [citation omitted.]

1 (Declaration of Martonick, Exhibit. A.)

2 The City claims that the foregoing answers are in fact responsive. (Declaration of
3 Martonick, Exhibit C.)

4
5 4. Grounds for Relief and Argument.

6 Federal Rule of Civil Procedure 26(b)(1) provides for discovery in civil actions of any
7 relevant matter not privileged. Relevant matter has been construed very broadly to encompass
8 any matter that bears on, or that reasonably could lead to other matter that could bear on, any
9 issue that is or may be in the case. *See e.g., Hickman v. Taylor*, 329 U.S. 495, 501, 67 S.Ct.
10 385, 388 (1947). “The question of relevancy is to be more loosely construed at the discovery
11 stage than at trial.” *Id.* Under the liberal discovery rules, the party who resists discovery bears
12 the burden of showing that discovery should not be allowed. *See, e.g., Blankenship v. Hearst*
13 *Corp.*, 519 F.2d 418, 429 (9th Cir. 1975).

14
15
16 **A. THE DEFENDANT CITY OF PULLMAN SHOULD BE REQUIRED**
17 **TO PROVIDE ANDREW WILSON’S JOB PERFORMANCE REVIEWS**
18 **AND EVALUATIONS.**

19 i. State law privileges do not apply to a federal cause of action.

20 The defendant objects to production of the requested records on the basis of the
21 Washington State Public Records Act. (Declaration of Martonick, Exhibit A.) Nonetheless:
22 “Where there are federal question claims and pendent state law claims present, the federal law of
23 privilege applies.” *Agster v. Maricopa County*, 422 F.3d 836, 839 (9th Cir. 2005); *also see*
24 FRE 501, and cases cited in the annotation.

1 In *Agster*, a suspect died while in police custody. *See id.* at 837. Corrections personnel
2 undertook a “mortality review” pursuant to local and federal policies. *See id.* at 838. “The
3 review was intended to be, and was, kept confidential.” *Id.* at 838. Parents of the deceased
4 brought a civil rights action against the responsible police agency. *See id.* at 837. They sought
5 discovery of the “mortality review.” *See id.* at 838. The defendants opposed the request on the
6 basis of state law. *See id.* The district court overruled the claim of privilege and ordered the
7 production of the document. *See id.* The Ninth Circuit sustained the trial judge on the basis the
8 federal law of privilege applied and that no federal privilege protected the requested records. *See*
9 *id.* at 839.

10 Like the request for the report in *Agster*, this case involves federal civil rights claims and
11 pendent state law claims. The defendant has asserted no federal privilege that would protect it
12 from disclosing the job reviews and evaluations requested. Therefore, the Defendant City of
13 Pullman should be required to disclose the requested material.

14
15 ii. The Washington State Public Records Act does not prevent disclosure of the
16 requested material.

17 The City objects to production of “job performance reviews and evaluations for Andrew
18 Wilson” on the basis that RCW 42.17.310(1)(b), RCW 42.17.255, *Dawson v. Daley*, 120 Wn.2d
19 782 (1993), and *Brown v. Seattle Public Schools*, 71 Wn. App. 613 (1993) create a privilege in
20 the contested material. (Declaration of Martonick, Exhibit A.) The cited portions of the statutes
21 provide:

- 22 (1) The following are exempt from *public* inspection and copying . . .
23 (b) Personal information in files maintained for employees, appointees, or elected
24 officials of any public agency to the extent that disclosure would violate their
25 right to privacy.

RCW 42.17.310 (emphasis added).

1 A person's "right to privacy," "right of privacy," "privacy," or "personal privacy,"
2 as these terms are used in this chapter, is invaded or violated only if disclosure of
3 information about the person: (1) Would be highly offensive to a reasonable
4 person, and (2) is not of legitimate concern to the public. The provisions of this
5 chapter dealing with the right to privacy in certain public records *do not create*
any right of privacy beyond those rights that are specified in this chapter as
express exemptions from the public's right to inspect, examine, or copy public
records.

6 RCW 42.17.255 (emphasis added.)

7 A plain reading of the foregoing provisions indicates that any privilege created by the
8 statute applies only to situations governed by the chapter, i.e. the Public Records Act. The
9 privilege or “exemption” created relates to the “*public’s right* to inspect, examine, or copy public
10 records” and no more. The right of privacy created in certain public records does not apply by
11 the terms of the statute to discovery in civil litigation.

12 The *Daley* case relied on by the defendant simply states that “[r]ecords which are relevant
13 to a controversy to which an agency is a party but which records would not be available to
14 another party under the rules of pretrial discovery for causes pending in the superior courts” are
15 exempt from disclosure under the public records act. 120 Wn.2d at 789-90. In *Daley*, the issue
16 was one of a party attempting to obtain work product concerning existing litigation. *See id.* at
17 786-87. *Daley* does not attempt to establish a rule of discovery, but merely expounds on the
18 scope of the public records act. *Brown* just says that certain personnel records may be exempt
19 from disclosure under the act. *See* 71 Wn. App. at 617. *Brown* does not discuss the scope of
20 discovery pursuant to litigation. Generally, when the Legislature wishes to create a privilege
21 applicable to litigation it does so directly and leaves little doubt about the scope of the privilege.
22 *See, e.g.,* RCW 5.60.060 (spousal privilege); RCW 5.60.072 (mediation privilege); RCW
23 5.62.020 (nurse privilege); and RCW 5.66.010 (admissibility of sympathetic gestures).

1 A case more analogous to the present than facts, than *Brown* or *Daley*, is *Barfield v. City*
2 *of Seattle*, 100 Wn.2d 878 (1984). In *Barfield*, the Supreme Court held that the police
3 department's internal investigation files were not exempt from disclosure under RCW
4 42.17.310(1)(d) for discovery purposes in active litigation, where plaintiffs alleged, among other
5 things, tortious conduct by police officers. *See id.* at 883-84. The *Barfield* Court rejected the
6 City's argument that such disclosure would inhibit both effective law enforcement and the
7 confidential reporting of complaints. *See id.* In doing so, the Supreme Court emphasized that
8 courts have the power to use protective orders to minimize the potential harms of disclosure. *See*
9 *id.* at 885.

10 The Public Records Act, by its own terms, does not create a privilege against discovery in
11 civil litigation. But even if the Act does create a limited privilege, *Barfield* indicates that the
12 concerns addressed by the Act can be resolved by the use of protective orders. In the present
13 case, a stipulated protective order was entered on January 30, 2006 regarding the City's
14 responses to the second set of interrogatories and requests for production. (Doc. No. 43, filed
15 and entered January 30, 2006.) The protective order would adequately minimize any potential
16 harm of further disclosure.

17
18 **B. THE DEFENDANT CITY OF PULLMAN SHOULD BE REQUIRED**
19 **TO SUPPLY RESPONSIVE ANSWERS TO CLEAR QUESTIONS.**

20 "[A]n evasive or incomplete disclosure, answer, or response is to be treated as a failure to
21 disclose, answer or respond." FRCP 37(a)(3). The Defendant City of Pullman's answers to four
22 interrogatories are evasive and incomplete, i.e. Nos. 4,5,6, & 7. In those interrogatories Plaintiff
23 requested information regarding Pullman Police Department "policies or procedures for
24 reviewing or evaluating" charging language in citations, probable cause for arrests, use of force,
25 and potentially racist acts. In other words, Plaintiff was requesting what kind of "after the fact"

1 procedures the Department employs, if any, to insure that officers are conforming to established
2 procedures and laws.

3 It is clear that the Defendant City of Pullman understood the nature of the requests
4 because of its responses. For example, in reply to Interrogatory No. 6 it states that "citations are
5 reviewed by the Whitman County Prosecuting Attorney for this issue." And, in response to
6 Interrogatory No. 7 the reply states that "members of the public who believed that they have
7 been subjected to excessive force may file a complaint with the police department."
8 Nevertheless, the Defendant does not directly answer any of the four questions. The questions
9 were not who else reviews Pullman's police officers' actions, or who may complain about them,
10 but how does the Department review them. These questions were not answered.

11
12 DATED this 13th day of March, 2006.

13
14 /s/Steve Martonick
15 Steve Martonick WSBA# 32213
16 Snyder & Martonick Law Offices, P.S.
17 155 S.E. Kamiaken
18 Pullman, WA 99163
19 509 334-4808

20 CERTIFICATION OF SERVICE

21 I hereby certify that on March 13th, 2006, I electronically filed the foregoing with the
22 clerk of the court using the CM/ECF system which will send notification of filing to the
23 following: Stewart Estes.

24 /s/ Steve Martonick
25 Steve Martonick WSBA# 32213